

# FINAL REPORT OF THE WORKING PARTY ON LEGAL AID IN CRIMINAL PROCEEDINGS

*To the Right Honourable Lord Dilhorne,*

*Lord High Chancellor of Great Britain,*

*and the Right Honourable Henry Brooke, M.P.,*

*Her Majesty's Principal Secretary of State for the Home Department.*

## INTRODUCTION

1. On 27th April 1962 we submitted a report to your predecessors on the working of new provisions for legal aid in criminal proceedings which became effective on 14th March 1960, when sections 21 to 23 of the Legal Aid and Advice Act 1949, and new Regulations governing the remuneration of counsel and solicitors assigned to give legal aid, were brought into operation.

2. Our first report dealt with the operation of the Poor Prisoners' Defence (Defence Certificate) Regulations 1960 and the Poor Prisoners' Defence (Legal Aid Certificate) Regulations 1960. This was the major part of our task, covering trials in courts of assize and quarter sessions and criminal proceedings in magistrates' courts. It now remains for us to consider, in the present report, the arrangements for legal aid in the Court of Criminal Appeal and in appeals to quarter sessions.

3. As we recalled in our first report, the provisions which were brought into force on 14th March 1960 did not affect the basic arrangements for the grant of legal aid in proceedings on an appeal. These continue to be governed by section 10 of the Criminal Appeal Act 1907 for appeals to the Court of Criminal Appeal, and by section 2 of the Summary Jurisdiction (Appeals) Act 1933 for appeals to quarter sessions. In accordance with these provisions the grant or refusal of legal aid remains the responsibility of the courts, and solicitors and counsel assigned to give legal aid receive payment for their services from local funds, the local authorities being reimbursed in due course by the Home Office. By section 2 of the Summary Jurisdiction (Appeals) Act 1933 an appeal aid certificate may be granted not only to an appellant who has been convicted of an offence or sentenced for an offence by a court of summary jurisdiction but also to a respondent where a person so convicted or sentenced has given notice of appeal to quarter sessions, and in consequence the Appeal Aid Certificate Rules 1960 apply equally to fees in respect of a legally aided respondent as to fees in respect of a legally aided appellant.

4. Section 21 of the Legal Aid and Advice Act 1949 provides that the Secretary of State, in making regulations governing the remuneration of solicitors and counsel assigned to give legal aid, and taxing officers, in assessing payments in individual cases, shall have regard to the principle of allowing fair remuneration according to the work actually and reasonably done.

5. Sections 22(4) and 23(4) of the Act provide for the payments made from local funds to a solicitor assigned to give legal aid under a legal aid certificate, a defence certificate or an appeal aid certificate to include sums for his fees and disbursements in respect of work reasonably undertaken by him in giving notice of appeal or applying for a case to be stated, and in matters preliminary thereto, where the work is done within the ordinary time for giving the notice or making the application. Where counsel is assigned under a defence certificate or an appeal aid certificate the sums paid may include the cost of obtaining counsel's opinion as to the appeal or application.

6. The costs payable out of local funds to a solicitor or counsel assigned to give legal aid in an appeal to the Court of Criminal Appeal, or to quarter sessions are as stated above, repaid to the local authority by the Secretary of State by virtue of section 23(1) of the Act of 1949.

7. The Secretary of State made the Criminal Appeal (Fees and Expenses) Regulations 1960 and the Appeal Aid Certificate Rules 1960 which came into force in March 1960, and which govern the payments made in respect of legal aid in the Court of Criminal Appeal and in appeals to quarter sessions respectively.

8. Our main task has been to examine the operation of these Regulations and Rules and the assessment of payments made under them, bearing in mind the provisions of the Legal Aid and Advice Act 1949 governing such remuneration.

9. We decided to restrict our request for information about appeal aid certificates to twenty-six courts of quarter sessions, selected at random from different circuits. These courts (which are listed in Appendix B) were asked to furnish particulars of the fees and expenses allowed to counsel and solicitors in appeals to quarter sessions in respect of which an order for payment on the local authority Treasurer was made in the six months (three months in the case of Middlesex Quarter Sessions) ending 30th June 1962. We are most grateful to the clerks of the peace concerned for their co-operation.

10. We should also like to express our appreciation of the assistance given to us by the former Registrar of the Court of Criminal Appeal, Sir Anthony King, who furnished particulars of payments made to counsel and solicitors and other information relating to legal aid in that court, and by Master Palmer, the present Registrar.

11. The Home Office has informed us that the returns of expenditure on legal aid made by local authorities show that in the period 14th March 1960 to 31st March 1961, that is, the first year of the working of the new arrangements, the cost of the legal representation of appellants paid by order of the Court of Criminal Appeal amounted to £3,508 (101 cases at an average cost of £34 14s. 8d. a case). In the financial year 1961-62 these costs amounted to £12,364 (185 cases at an average cost of £66 16s. 8d. a case). The payments made out of local funds under an appeal aid certificate in the period 14th March 1960 to 31st March 1961 amounted to £25,341 (870 cases at an average cost of £29 2s. 7d. a case). In the financial year 1961-62 these costs amounted to £37,718 (1,256 cases at an average cost of £30 0s. 7d. a case).

12. Part I of this report deals with the remuneration of solicitors and counsel assigned to give legal aid in appeals. We have not made a comprehensive study of the whole system of legal aid in appeals, but as in our first report, we have felt it desirable to refer to several matters relating to the basic structure of legal aid, to which our attention was drawn in the course of our discussions. These have been dealt with in Part II of the report.

## A. Legal Aid in the Court of Criminal Appeal

## (1) THE CRIMINAL APPEAL (FEES AND EXPENSES) REGULATIONS 1960

13. *Summary of Regulations.* Fees are assessed by the Registrar within the limits prescribed by the Regulations. The maximum and minimum fees are the same as those prescribed for counsel and solicitors in a trial on indictment, namely, a basic fee for solicitors of not less than £8 8s. 0d. and not exceeding £78 15s. 0d. and a brief fee for counsel of not less than £8 13s. 0d. and not exceeding £64 10s. 0d. In cases where two counsel have been assigned by the court, the fees are at large. The Regulations contain provisions similar to those in the Poor Prisoners' Defence (Defence Certificate) Regulations 1960 for the payment of additional fees or refreshers where an appeal is not concluded on the day on which it started, for a percentage increase in the fees allowed where a solicitor or counsel represents two or more appellants, for the payment of fees to counsel for a conference or consultation, for advice in writing, or for an application to the court for a case to stand out of the list, and for the payment of solicitors' expenses. Where notice of abandonment of an appeal is received the fees payable to a solicitor or counsel already assigned are fixed at the Registrar's discretion within the maximum limits prescribed by the Regulations. The Regulations provide for the payment of witnesses' expenses, and an appellant who is not in custody may be paid the expenses of his appearance in proceedings relating to the appeal. If it appears to the Registrar that for any reason, including the exceptional length, complexity or difficulty of a case, the amounts prescribed by the Regulations would not provide fair remuneration according to the work actually and reasonably done, he may allow fees in excess of the prescribed limits. There is no provision in these Regulations, as there is in the Regulations relating to legal aid at assizes or quarter sessions, for a solicitor or counsel to make representations to the court as regards any sum allowed him under the Regulations, or as regards a refusal by the Registrar to operate the "escape clause". (See paragraphs 16 to 18 of our first report, and paragraph 18 below.)

14. *Adequacy of prescribed fees.* The Bar Council remain of the opinion that the minimum and maximum brief fees prescribed for counsel should be ten guineas and seventy-five guineas respectively. We have been informed that in practice, the brief fee allowed is now never less than ten guineas, which is regarded as the proper fee for the simplest type of case. It appears desirable that the Regulations should be brought into line with current practice and we accordingly recommend that the minimum brief fee payable to counsel should be increased to ten guineas in the Regulations.

15. We have seen no evidence to suggest that the existing maximum brief fee of sixty guineas is inadequate. In general the fees paid are considerably below the maximum. Where, as is often the case, leave to appeal against conviction is given on one point, in a case which does not entail a great deal of difficulty, the brief fee allowed is usually around twenty guineas. In more complex cases the fee might be increased to forty guineas or more, according to the amount of work involved, but we were informed that there were not many cases in which the Registrar felt justified in allowing the maximum fee. There was not much occasion for using the "escape clause" since, in a case of sufficient importance and complexity to justify payment of fees in excess of the maximum, two counsel were almost invariably assigned, and the fees were consequently at large and not restricted by the scale. The Registrar does not consider that the existing maximum has any inhibiting effect on the assessment of fees or that if the maximum were increased there would be any change in practice in the amounts allowed. In the circumstances we do not wish to recommend any increase in the maximum brief fee.

16. In the large majority of cases where legal aid has been granted in an appeal to the Court of Criminal Appeal, it has been the practice to assign to the appellant counsel only, the Registrar acting as the appellant's solicitor. We have been informed that this practice has been criticised and if the

general review which we suggest in paragraph 62 is carried out it will no doubt be one of the subjects to be examined. The Registrar has furnished particulars of the fees allowed to solicitors during the first three months of 1962 in those cases where a solicitor also was assigned to the appellant. It does not appear from this information that the basic fees payable to solicitors, prescribed in the Regulations, require any amendment.

17. In paragraphs 23 and 47 of our first report we recommended that the Poor Prisoners' Defence (Defence Certificate) Regulations and the Poor Prisoners' Defence (Legal Aid Certificate) Regulations should be amended to provide that in cases where a single counsel is assigned, a standard fee of £2 7s. 0d. should be paid for a conference lasting not more than half an hour. We recommend that Regulation 2(3)(a) of the Criminal Appeal (Fees and Expenses) Regulations should be similarly amended. (See paragraph 31 below, about the payment of such fees in appeals to quarter sessions.)

18. We have given some consideration to the question whether provision should be made in these Regulations, similar to that which exists in the lower courts, for an appeal to the Court by a counsel or solicitor who is dissatisfied with the assessment of a sum under the Regulations, or with a refusal by the Registrar to apply the "escape clause". We were informed in May 1962 that no cases had occurred during the past eighteen months in which counsel had disputed an assessment. The Registrar has informed us that if representations were made in a case about a refusal to apply the "escape clause" he would consult the Lord Chief Justice, or the judge presiding over the Court. It appears in the light of what we have said above that there would be no objection in principle to the inclusion in the Regulations of provision for appeals against the Registrar's decision. If as we hope, consideration is given to our suggestion in paragraph 74 of our first report, that special machinery should be set up to deal with appeals against assessment or against particular interpretations of the Regulations, it would be logical that any such machinery should cover appeals from decisions of the Registrar of the Court of Criminal Appeal. If, however, there is likely to be delay in providing such machinery we recommend that the Regulations should be amended to include a provision on the lines of Regulation 7 of the Poor Prisoners' Defence (Defence Certificate) Regulations.

## (2) APPLICATION OF THE REGULATIONS

19. *Assessment of fees.* The Registrar has on three occasions since we began our task provided us with information about the fees paid in appeals to the Court of Criminal Appeal. This information related to (1) a specimen list of appeals heard in 1960 after the new Regulations came into force; (2) appeals heard during the period May to August 1961 inclusive; and (3) appeals heard during the period January to March 1962 inclusive.

20. The particulars furnished showed that in eighty-five appeals heard during the period January to March 1962 in which one counsel only was assigned to the appellant and which apparently lasted a single day or less, the average amount paid to counsel was £16 13s. 0d. The lowest fee allowed, which was paid in forty of these cases, was 10 guineas. A fee in excess of 25 guineas was allowed in six cases. The highest fee paid in single counsel cases, which was allowed in two cases, was 45 guineas. On the specimen list of appeals heard in 1960, in 24 cases where one counsel was assigned and the appeal apparently did not occupy more than a single day, the average amount allowed to counsel was £15 10s. 0d. The lowest

amount allowed was 8 guineas, which was paid in nine cases. A fee in excess of 25 guineas was paid in three cases, the largest amount paid being 40 guineas.

21. The information received from the Registrar, relating to appeals heard during the period May to August 1961 showed a generally higher level of payments than those made in the 1960 and 1962 cases which had been brought to our notice. The average brief fee paid in 31 cases in this period where one counsel only was assigned was about 32 guineas.

22. During the period January to March 1962 a solicitor was assigned to the appellant in sixteen of the eighty-five cases referred to in paragraph 20. The average amount paid to solicitors in these cases, excluding expenses, was £16 19s. 0d. The minimum fee of 8 guineas prescribed in the Regulations was paid in one case. The highest fee allowed was £35; this was the only single-counsel case where a fee in excess of 25 guineas was paid to the solicitor. In eleven of these sixteen cases the amount allowed was the full amount claimed in the solicitor's bill of costs. No comparison was possible with the fees paid to solicitors in appeals in the 1960 and 1961 periods for which information had been furnished, owing to the infrequency with which a solicitor was assigned in those cases. (There was one such case in the list of appeals for 1960, and four cases in the 1961 appeals, three of which were cases in which two counsel had been assigned.)

23. Where the Court of Criminal Appeal has assigned two counsel to an appellant, the Registrar, in determining counsel's fees, applies the general rule that the brief fee to be paid to junior counsel should be two-thirds of the fee paid to leading counsel. We understand that this is also the accepted practice in courts of assize and quarter sessions where two counsel are assigned under a defence certificate. There is nothing in either the Criminal Appeal (Fees and Expenses) Regulations or the Poor Prisoners' Defence (Defence Certificate) Regulations which bears directly on this point, and we agree with those who have taken the view that the two-thirds rule is applicable in legal aid cases. It should be remembered that the two-thirds rule does not apply over the whole range of fees. In cases where the leader's fee exceeds 150 guineas the amount by which the junior's fee exceeds 100 guineas may be a matter for arrangement. In such cases, therefore, the Registrar, or clerk of assize or clerk of the peace as the case may be, is not bound to have regard to the two-thirds rule in regard to the excess of the junior's fee over 100 guineas. We think that this should be made more widely known, as we have reason to believe that some courts are not aware of it. We think it right to point out, however, that despite the exclusion of cases in which fees over 150 guineas are paid, taxing officers in some cases to which the rule does apply, might be required to allow fees for the junior which exceed those which are justified by the requirement of section 21 of the Legal Aid and Advice Act 1949, namely, that regard shall be paid to the principle of allowing fair remuneration according to the work actually and reasonably done. We are asked to record that the Bar Council do not accept that the application of the two-thirds rule can involve any conflict with section 21.

24. It is the Registrar's practice, when sending out a brief to counsel assigned to give legal aid in an appeal, to mark a fee on the brief. We were informed, however, that such markings are intended only to serve as a guide. The fee is finally assessed when the case is over, and in making the assessment full account is taken of all the relevant factors, including the type of case, the work performed by counsel, the amount of research entailed,

the number of persons represented, and the length of hearing of the case. In practice, it is rare for a case to last more than one day, and many do not last a whole day. We think that there is a conflict between marking a fee in advance and the requirement of section 21 to observe the principle of fair remuneration for work actually and reasonably done and we hope that it will be found possible to discontinue the practice.

25. An important difference between the assessment of fees in the Court of Criminal Appeal and assessments in trials on indictment, is that whereas clerks of assize and clerks of the peace are concerned with the determination of prosecution fees, the Registrar plays no part in the determination of the respondent's fees, and, even if he ascertained the amount of such fees, would not necessarily know all the factors which had been taken into account in their assessment. Accordingly, it appears that the principle to which we referred in paragraph 32 of our first report, that in assessing the fees of defence counsel the fees paid to prosecuting counsel should be used as a yardstick in accordance with principles set out by the Lord Chief Justice, cannot be applied to the assessment of fees in the Court of Criminal Appeal. We understand, however, that in assessing the fees of counsel for the appellant the Registrar has regard to the fees paid under a defence certificate in cases where legal aid was granted for the trial.

26. A further difficulty in the assessment of fees is that as, in the majority of cases, no solicitor is assigned to the appellant in appeals to the Court of Criminal Appeal, there is no-one to present a detailed account of the work which has been done, and the Registrar does not know of the preliminary work done by counsel in a case.

27. We suggest that counsel should submit a note to the Registrar setting out the work done. The Bar Council suggested that in the absence of a yardstick for the assessment of the fees to be paid to counsel, in the form of the fees paid to counsel for the respondent, such notes should, if counsel so wishes, be fee notes in the full sense of the word and contain proposals of the amount to be paid to counsel for the appellant, and we think that this would be a useful course. It would be the duty of the Registrar to reduce any amounts claimed if he considered that they were in excess of fair remuneration for work actually and reasonably done. Such procedure entails counsel accepting responsibility for claims made by his clerk, on his behalf, and also the clerk in making claims bearing in mind the provisions of section 21 of the Legal Aid and Advice Act 1949 and the Criminal Appeal (Fees and Expenses) Regulations. We understand that it is the practice, when a solicitor is assigned, for the latter to submit a detailed bill of costs, and we consider that this is right.

28. It appeared from the information relating to fees which we received from the Registrar that in none of the cases concerned had a conference fee or advice fee been paid to counsel and that in only one case was a refresher fee paid (25 per cent) and, in the same case, an addition made to the brief fee in respect of a second appellant (25 per cent). We were informed that it is the usual practice to include such subsidiary amounts in the brief fee. It appears to us that to conform with the Regulations these elements should be separately assessed, and payment allowed for each of them; this is the normal practice in other courts and we would hope that it may be found possible to adopt the same practice in assessments in the Court of Criminal Appeal.

## B. Legal Aid in Appeals to Quarter Sessions

### (1) THE APPEAL AID CERTIFICATE RULES 1960

29. *Summary of Rules.* Fees are determined by the court within the limits prescribed by the Rules. The provisions of the Rules, including the maximum and minimum fees payable to solicitors and counsel, are, subject to what is said below, similar to those in the Criminal Appeal (Fees and Expenses) Regulations (see paragraph 13 above). These Rules differ from the Regulations in that there is no specific provision for the payment of witnesses' expenses (see paragraphs 55-57 below). Where a solicitor assigned under an appeal aid certificate reasonably undertakes work in applying for a case to be stated, he may be allowed sums in respect of his disbursements, including a fee of not more than ten guineas, and a fee not exceeding £11 for counsel's opinion. A solicitor or counsel may make written representations to the presiding judge as regards any assessment or as regards a refusal to apply Rule 6 (the "escape clause").

30. *Adequacy of prescribed fees.* No evidence has been submitted to us that the maximum or minimum fees prescribed in the Rules, are inadequate. The general level of fees allowed in practice is well below the maximum fee prescribed, and in none of the appeals in respect of which we received information from the courts, was it found necessary to use the "escape clause". We do not recommend any change in these fees.

31. As in the case of the Criminal Appeal (Fees and Expenses) Regulations (see paragraph 17 above), we recommend that Rule 2(3)(a) should be amended to provide for the payment of a standard fee of £2 7s. 0d. for a conference lasting not more than half an hour.

32. It has been suggested to us that when counsel or solicitors assigned to give legal aid to an appellant undertake work in connection with an application for bail before a Judge in Chambers they should be paid for the work under the Appeal Aid Certificate Rules. We understand that these cases are infrequent as such applications are normally made through the Official Solicitor. We agree that where a solicitor or counsel acting for an appellant makes such an application it would be right for the work to be taken into account in assessing his remuneration. It appears, however, that there is doubt whether the Summary Jurisdiction (Appeals) Act 1933 allows for such work by solicitor or counsel acting under an appeal aid certificate. We think that when opportunity offers, the Act and subsequently the Rules should be amended. It seems desirable that a similar provision should be included in the Criminal Appeal (Fees and Expenses) Regulations and in the Poor Prisoners' Defence (Defence Certificate) Regulations and the Poor Prisoners' Defence (Legal Aid Certificate) Regulations, and we suggest that the legislation necessary for this purpose should be considered at the same time.

### (2) THE PRACTICE OF TAXING OFFICERS IN APPLYING THE APPEAL AID CERTIFICATE RULES 1960

33. *Assessment of fees.* In order to give some indication of the level of remuneration in appeals to quarter sessions information relating to the brief fees allowed to counsel and the basic fees allowed to solicitors has been extracted from the returns referred to in paragraph 9 and set out in Appendix A.

34. As our information was obtained from a limited number of courts and covers a comparatively small number of appeals, it would be misleading to attempt to draw close comparisons between the fees allowed in the various courts. As far as we can judge, the standard of remuneration allowed was, in general adequate. There was, however, some variation in the amounts paid in different courts in what appeared to be comparable cases (although this

was less than the variation in fees paid under defence certificates, to which we referred in paragraphs 27 and 28 of our first report) and the figures furnished suggested that the standards of "fair remuneration" which had been adopted in some parts of the country were noticeably lower than those adopted elsewhere.

35. We realise, and have already mentioned in paragraph 30 of our first report, that under the present system of taxation, some variation in the assessment of fees is probably inevitable. We consider it desirable however that the standards of assessment should be more uniform than appears to be the case at present, and this applies to the assessment of fees and payments in appeals to quarter sessions, as much as to the assessment of fees and payments in trials on indictment.

36. The Law Society have informed us that in the experience of their members the same points of difficulty about taxation practice and interpretation of the Regulations arise on appeal aid certificates as on defence certificates. The views we expressed in our first report on refresher fees (paragraph 35), increases for additional defendants (paragraph 36), fees for applications and opinions (paragraph 37) and conference fees (paragraphs 38, 39 and 41) apply equally to appeal aid certificates. We observed from the returns that whereas in some courts conference fees were regularly allowed, in others no conference fees had been paid. A fee for an application was allowed in two cases only, and a fee for an opinion in only one case. In one case in which counsel and solicitor had represented two appellants, no increase had apparently been made in the fees payable, as required under Rule 3.

37. The returns by the courts included two cases where counsel only had been assigned under an appeal aid certificate. We are not aware of any authority for such a practice; in accordance with section 2(4) of the Summary Jurisdiction (Appeals) Act 1933 a person in respect of whom an appeal aid certificate has been granted is entitled to have both a solicitor and counsel assigned to him, unless the appeal is heard in a court where solicitors have a right of audience, in which case a solicitor only may be assigned.

38. One difference between the assessment of fees under an appeal aid certificate and assessment under a defence certificate is that in appeals to quarter sessions the taxing officer has no responsibility for taxing the fees allowed to counsel representing the prosecution, and generally has no knowledge of them. In consequence, these fees cannot be used as a yardstick in assessing the fees payable to counsel assigned under an appeal aid certificate and the recommendation which we made in paragraph 32 of our first report is not applicable to these cases.

39. Apart from this, the views we expressed in our first report on the practice of taxation and assessment are generally relevant. In particular, we consider it important that the solicitor assigned under an appeal aid certificate should be given an opportunity to show the work done in the case and that in assessing the fees the work done by solicitor and counsel should be considered on its merits.

40. It has been suggested to us that in the absence of prosecution costs as a guide in assessing the fees of counsel assigned under an appeal aid certificate it would be helpful to taxing officers if counsel submitted a fee note. We see no objection to this course, or to the note containing claims for the amount to be paid to counsel, subject to the considerations set out in paragraph 27 above.



41. We understand that in cases where a legal aid certificate was granted for the trial it is the usual practice for the same solicitor to act under an appeal aid certificate, and that a difficulty which sometimes faces taxing officers in such cases is the division of costs for certain items between the trial and the appeal. This difficulty should not arise if solicitors submit a bill of costs in sufficient detail, on the lines suggested in our first report (Appendices 9 to 11).

## PART II

### (1) MISCELLANEOUS QUESTIONS

42. We consider it desirable to draw attention in this part of our report to several matters which, although outside the scope of our main task, arise from our consideration of the operation of the Regulations and appear to require consideration if the arrangements for the grant of legal aid in appeals are to function satisfactorily.

43. *Legal Advice on Appeal.* The first, and most important, point to which we wish to refer, is the stage at which a would-be appellant to the Court of Criminal Appeal can get legal advice. As we have already stated, in cases where the appellant was granted a defence certificate at the trial the solicitor assigned under the certificate may be paid a fee not exceeding £10 10s. 0d. and disbursements, including, in a case where counsel was assigned, counsel's fee not exceeding £11 0s. 0d. for an opinion, for work reasonably undertaken in giving notice of appeal or of an application for leave to appeal, and in matters preliminary thereto, provided that the work was done within the normal time for giving notice of appeal (section 23(4) of the Legal Aid and Advice Act 1949 and Regulation 6 of the Poor Prisoners' Defence (Defence Certificate) Regulations 1960). The courts were informed in Home Office Circular No. 90/1961 that the Lord Chief Justice had expressed agreement with the view that Regulation 6 allows payment to be made, in appropriate cases, where, as a result of advice, no appeal is entered or application for leave to appeal made.

44. The intention of these provisions was to supply a means of paying for work done by solicitor or counsel between the time when a case is disposed of by the court of trial, and that at which the appeal tribunal becomes seized of the matter. The returns made by courts of assize and quarter sessions of fees paid under defence certificates relating to an assize or sessions in the latter part of 1960, however, showed no payments under Regulation 6, for the period under review, and while we are informed that there are cases where use is made of these provisions, it is evident that this is comparatively infrequent. We understand that the similar provision in Regulation 6 of the Poor Prisoners' Defence (Legal Aid Certificate) Regulations, under which a solicitor assigned under a legal aid certificate may be paid for advice in connection with an appeal to quarter sessions against a summary conviction, is also little used.

45. That a convicted person may have need for professional advice and assistance at the stage of considering an appeal has always been accepted. Further, if advice on the grounds of appeal were generally available to convicted persons, it might well be that a number of unjustified appeals would be avoided and time and labour saved in the Court of Criminal Appeal. The court would, no doubt, also be assisted by having applications for leave to appeal cast in proper form. There may be practical difficulties about giving an automatic right to legal advice on the question of appeal without any control which would need careful consideration.

46. The infrequency of the use made of the existing provisions does not mean that solicitors and counsel, acting under a defence certificate do not, as part of their professional duty, consider whether there are grounds for appeal where the person whom they defended has been convicted and sentenced. We are satisfied that they do; but this does not necessarily mean they inform the client when they form the view that there is no ground for appeal; nor do they claim a fee for having considered the question. Some part of the lack of use of the provisions is due to ignorance of them and we are glad to know that The Law Society and the Home Office and Prison Commission have recently taken steps to make them more widely known. This is not, however, the whole solution.

47. It appears to us that there are two matters which need to be further considered. The first is what authority should have the duty of deciding whether there should be, in a particular case, legal assistance to a convicted person considering an appeal, and also whether such decision should be limited to the question of means or should extend to the merits of the case. The present system avoids the necessity for a special decision by making advice on appeal an extension of the defence certificate. This is obviously incomplete in that it makes no provision for the person who has had no defence certificate but wants help in considering an appeal. It would be possible to place responsibility for granting or refusing legal assistance in all cases, in the period between the trial and the proceedings before the appeal tribunal, on the appeal tribunal, in this case the Court of Criminal Appeal. Section 10 of the Criminal Appeal Act 1907 provides that the Court of Criminal Appeal may at any time assign to an appellant, defined in section 21 of the Act as including a person who has been convicted and desires to appeal under the Act, a solicitor and counsel, or counsel only, in any appeal or proceedings preliminary or incidental to an appeal. In practice the court grants legal aid for the hearing of an appeal and, in special cases, for the hearing of an application for leave to appeal. It does not grant legal aid for the purpose of advising a convicted person about the grounds for an appeal or drawing up the notice of appeal etc. If the responsibility for granting such aid were to be undertaken by the Court of Criminal Appeal it would mean either that the court would have to grant it automatically, on receiving an application, subject only to a consideration of means, or that present arrangements for the various stages of an appeal would have to be substantially altered, since the court would have no previous knowledge of the case and could rarely adequately consider the merits, other than financial, of an application for legal aid for the purpose of advising on whether to appeal, or of drafting an application for leave, unless the court has the assistance of a transcript, and the provision of a transcript is often a lengthy process. Further, consideration of applications for legal aid in every case where an appeal was contemplated would impose a heavy burden on the Court of Criminal Appeal and on its staff.

48. It would also be possible to place responsibility for granting or refusing legal assistance for the purpose of advising on an appeal upon the court of trial. There are obviously possible objections in principle to making a court which has tried and sentenced a person the authority for deciding whether he shall be given assistance to appeal against its decision. We would not think that the existing provision should be changed to provide for a fresh consideration by the court of trial in every case. As we have pointed out, however, a person not legally aided at his trial, who is in prison and who has not the means to pay a solicitor, has at present no effective method of obtaining legal advice on whether he has grounds for appeal, or of obtaining assistance in drawing up a notice of appeal or an application

for leave to appeal. This difficulty could be overcome by amending the law to enable a convicted person who had not been granted a defence certificate, to apply to the court of trial for legal aid during the preliminary stages of appeal. The possible objections in principle to making the court of trial the authority for deciding whether a convicted person should be given legal aid for the purpose of obtaining advice on whether he has grounds of appeal or of obtaining assistance in drawing up a notice of appeal or an application for leave to appeal, would be overcome if the court of trial was obliged to grant such legal aid automatically subject only to a consideration of means, but as we have stated in paragraph 45 above, the giving of an automatic entitlement to such assistance is a matter which would need careful consideration. Problems would moreover arise, when the court was no longer sitting, and though some of these might be overcome by granting the clerk of the court power to deal with a matter of this kind when the court was not sitting, clerks of assize in particular would find it difficult to exercise this function.

49. An alternative which we have not explored is whether it would be desirable or practical for The Law Society to be made responsible for deciding whether assistance should be given at the preliminary stage of an appeal and indeed for the appeal itself. This is a function which they already perform in the case of appeals to the Divisional Court in criminal causes.

50. The second matter for consideration is how the solicitor, and counsel if one is instructed, are to do this work within the ordinary time for appealing. While, as we have mentioned, section 23(4) of the Legal Aid and Advice Act 1949 and Regulation 6 of the Poor Prisoners' Defence (Defence Certificate) Regulations 1960 enable payment to be made to a solicitor or counsel assigned under a defence certificate for work reasonably undertaken in giving notice of appeal or of an application for leave to appeal, the statute and Regulations impose no obligation on solicitor or counsel to perform this work. We have no doubt that where the solicitor and counsel who appear for the prisoner consider that there are reasonable grounds for appeal, they advise him accordingly on the conclusion of the trial and give him the necessary assistance in lodging notice. Difficulties arise, however, where the advice and assistance cannot be given at this stage. After the trial the prisoner is usually removed to a prison at some distance from where his solicitor practices and unless he succeeds in consulting his solicitor before leaving the court he may be unable to obtain the advice he seeks. This is not a matter which could often be dealt with satisfactorily by correspondence; particularly as notice of appeal must be given within ten days of the date of conviction and all the work must be done within this time, which is often too short in these cases. Some help might be obtained from a development of agency arrangements by solicitors, but there would still be difficulties of location of prisons and of passing on the necessary amount of information to the solicitor who was to act. A system which entitled all prisoners who receive legal aid at the trial, or even more all who wanted it subsequently, to receive visits in prison from a solicitor for the purpose of advising them as to an appeal, would be expensive, and would place a considerable burden on solicitors.

51. A further difficulty arises in those cases in which it is not possible for a solicitor or counsel to advise on the prospects of an appeal unless additional information, for example, the transcript or depositions, is first obtained. This is especially likely if a solicitor or counsel who did not act at the trial is brought in. A transcript is not, however, likely to be available within the time allowed for notice of appeal. Moreover, if a transcript were to be provided for this purpose in a large number of cases, the cost would be considerable. In considering the question of cost, however, it should be borne in mind

that the Court of Criminal Appeal at present obtain a short transcript (with other material), in all cases where notice of appeal is lodged or application for leave to appeal is made. If the provision of advice at an earlier stage resulted in a reduction in the number of applications, there might be a considerable saving of expenditure, as well as of time, in the Court of Criminal Appeal.

52. Similar problems arise, to some extent, with regard to the arrangements for obtaining advice as to an appeal to quarter sessions. Regulation 6 of the Poor Prisoners' Defence (Legal Aid Certificate) Regulations 1960 provides that where a solicitor assigned under a legal aid certificate reasonably undertakes work in giving notice of appeal or applying for a case to be stated, and in matters preliminary thereto, he may be allowed additional payments provided the work was done within the ordinary time for giving notice or making the application. The practical difficulty which a convicted person experiences in consulting his solicitor as to an appeal is probably not so general in these cases, as in the case of persons convicted in the higher courts, as a conviction will less often result in a sentence of imprisonment. A convicted person who was not in custody could, moreover, seek advice from a solicitor under the Legal Advice Scheme, irrespective of whether he had been granted a legal aid certificate for the trial.

53. The existing provisions for the grant of legal aid for the purpose of obtaining advice on whether an applicant has grounds for appeal or of obtaining assistance in drawing up a notice of appeal or an application for leave to appeal clearly require examination and revision. The preceding paragraphs show, in our view, that the problem is a complex one involving the amount of legal assistance which should be provided; what authority should control the grant or refusal of legal aid for this purpose; whether this control should be limited to the means of the applicant or should take account of the merits; and the practical method by which solicitor and counsel are to give the desired assistance. We could not, without considerably extending our field of enquiry, make proposals on these questions. We suggest that the whole matter should be studied as part of the wider review of the legal aid system which we suggested in paragraph 75 of our first report.

54. In the meantime there are certain amendments which are desirable in the present scheme. We have already mentioned, in paragraph 47, the important point of providing for the man who has no defence certificate but wishes for advice on appeal. The grant of power to the court of trial to deal with this would go some, though not all of the way. The payment which can be made to counsel under Regulation 6 is at present limited to a fee for an opinion as to the appeal. This appears to us to be insufficient to cover all the work which could properly be done by counsel in such cases. The assistance of counsel would often be valuable in settling the grounds of an appeal. The Regulations cannot however be amended to provide payment for such additional work because of the terms of section 23(4) of the Legal Aid and Advice Act 1949. It appears desirable that the law should be altered in order that as well as payments which may be made to a solicitor for work reasonably undertaken in giving notice of appeal there may, where appropriate, be allowed a separate fee to counsel for settling the grounds of appeal. We understand that cases have occurred where a convicted person has experienced difficulty in obtaining a copy of the transcript of the trial for the purpose of considering the question of appeal, and that doubt has existed in certain courts whether there is power under Regulation 6 to authorise payment for a copy of the transcript. We do not suggest that a copy of the transcript should be authorised automatically in all cases where a defence certificate has been granted. Considerable expense and time may

be involved, for which there would not be sufficient justification. In appropriate cases, however, a convicted person should be able to obtain a copy of the transcript, and Regulation 6 should be amended in order to avoid doubt as to the power of the courts to authorise expenditure for this purpose.

55. *Witnesses' expenses.* We understand that several clerks of the peace have consulted the Home Office about difficulties which arise owing to the absence of any specific provision for the payment of witnesses for an appellant or respondent in an appeal to quarter sessions. It appears to be the case that, for ordinary appeals to quarter sessions, there is no specific authority, either in the Costs in Criminal Cases Act 1952, or in the Summary Jurisdiction (Appeals) Act 1933, for the payment of the costs of witnesses for the appellant or the respondent, from local funds.

56. We understand that when clerks of the peace have raised this question the Home Office has expressed the view that while the legal position is not free from doubt, the payment of such expenses might be authorised as solicitors' out-of-pocket expenses under Rule 1(3)(b) of the Appeal Aid Certificate Rules 1960 in cases where an appeal aid certificate has been granted. A similar position exists in non-indictable cases in magistrates' courts; The Law Society have informed us that their Area Committees have adopted the same course for the payment of witnesses' expenses in cases where legal aid certificates have been granted.

57. This appears to be the only way of overcoming the difficulty at present. It is obviously, however, not fully satisfactory and an amendment of the law is clearly desirable to make plain the source from which witnesses' expenses in these cases should be paid. The present doubt raises difficulties for solicitors acting under an appeal aid certificate particularly in cases where it is desired to call expert witnesses (see paragraph 61 of our first report).

58. *Surrender of costs awarded by court.* A person who has been granted legal aid in civil proceedings is required, by virtue of section 2(1)(d) of the Legal Aid and Advice Act 1949 to pay to the legal aid fund any sums recovered from the other party under an order for costs. Section 22(5) of the Act, and the Poor Prisoners' Defence (Legal Aid Certificate) (Recovery of Costs) Regulations 1960 made under that section, similarly provide for payment to the legal aid fund of any sums payable in satisfaction of an order for costs made in favour of a person who is granted a legal aid certificate under section 2 of the Poor Prisoners' Defence Act 1930. There appears, however, to be no similar statutory provision with regard to legal aid in other criminal proceedings, either in appeals or otherwise. A person in such a case who has received legal aid is, therefore, apparently under no obligation to surrender to the fund meeting the expenses of legal aid any costs which he may receive under an order from the court.

59. We suggest that this matter should be further looked into and that if necessary, statutory provision should be made for the surrender of such costs.

60. A report dealing with legal aid in appeal proceedings would not be complete without a mention of the House of Lords. Since 1960, statutory provision has existed for the grant of legal aid in appeals to the House of Lords in criminal cases. Under section 8 of the Administration of Justice Act 1960 the Court of Criminal Appeal may now grant legal aid to a defendant for the purpose of an appeal to the House of Lords from a decision of the Court of Criminal Appeal, whether the defendant is the appellant or respondent in the appeal; the fees of counsel and the fees and expenses of the solicitor assigned to give legal aid are assessed by officers

of the House of Lords and defrayed out of local funds. The costs are repaid to the local authority by the Secretary of State in accordance with section 23(1) of the Legal Aid and Advice Act 1949.

61. It is not part of our function to consider the remuneration allowed to counsel and solicitors in these cases (which is not governed by regulations made by the Secretary of State) or to enquire into the working of section 8 of the Administration of Justice Act 1960. We should like, however, to record our view that any full investigation of legal aid in the criminal courts should cover procedure in cases before the House of Lords.

## (2) GENERAL OBSERVATIONS

62. In concluding our second report we wish to state that our further enquiries have confirmed and strengthened the view we expressed in paragraph 75 of our first report, that there is a need for a broadly based examination of the whole machinery for providing legal aid in criminal proceedings. Since the preparation of our first report we have been informed that the courts are experiencing difficulty in the matter of the examination of the means of applicants for legal aid and we think that this is one of the points which should be considered in connection with the general review. Our enquiries have shown us how desirable it is that the subject should be considered as a whole; examination of separate aspects, or dealing with the problem piecemeal, is likely to lead to anomalies and inconsistencies, and to gaps in the provision made.

## Summary of Conclusions

63. (1) In this report we have considered the arrangements for legal aid in the Court of Criminal Appeal and in appeals to quarter sessions.
- (2) We recommend that the minimum brief fee payable to counsel under the Criminal Appeal (Fees and Expenses) Regulations, should be increased to ten guineas. We do not recommend any change in the maximum brief fee (paragraphs 14 and 15).
- (3) We do not recommend any change in the maximum or minimum basic fees for solicitors, prescribed in the Criminal Appeal (Fees and Expenses) Regulations (paragraph 16).
- (4) Regulation 2(3)(a) of the Criminal Appeal (Fees and Expenses) Regulations and Rule 2(3)(a) of the Appeal Aid Certificate Rules should be amended to provide that in criminal proceedings where a single counsel is assigned, a standard fee of £2 7s. 0d. should be paid for a conference lasting not more than half an hour (paragraphs 17 and 31).
- (5) There is a case for the amendment of the Criminal Appeal (Fees and Expenses) Regulations to include a provision on the lines of Regulation 7 of the Poor Prisoners' Defence (Defence Certificate) Regulations for appeals against an assessment or a refusal to apply the "escape clause". If consideration is given to the institution of special machinery for appeals, as recommended in paragraph 74 of our first report, any such machinery should cover appeals from decisions of the Registrar of the Court of Criminal Appeal (paragraph 18).
- (6) We agree that the general rule which applies in cases where leading counsel is engaged, that the brief fee to be paid to junior counsel should be two-thirds of the fee paid to leading counsel, appears to be applicable in legal aid cases. We think that it should be made more widely known that the two-thirds rule does

not apply over the whole range of fees in that, where in cases the leader's fee exceeds 150 guineas, the amount by which the junior's fee exceeds 100 guineas may be a matter for arrangement. In such cases, therefore, the Registrar, or clerk of assize or clerk of the peace, as the case may be, is not bound to have regard to the two-thirds rule in regard to the excess of the junior's fee over 100 guineas. We consider that the application of this rule may in some cases not accord with the principle laid down in section 21 of the Legal Aid and Advice Act 1949 of allowing fair remuneration according to the work actually and reasonably done. We are asked to record that the Bar Council do not accept that the application of the two-thirds rule can involve any conflict with section 21 (paragraph 23).

- (7) We hope that it will be found possible to discontinue the practice of the Registrar of the Court of Criminal Appeal, when sending a brief to counsel assigned to give legal aid in an appeal, of marking a fee on the brief (paragraph 24).
- (8) Counsel should submit a note to the Registrar setting out the work done, and if counsel wishes this should contain proposals of the fees which counsel (or his clerk with his authority) considers should be paid. Where a solicitor is assigned he should submit a detailed bill of costs (paragraph 27).
- (9) The amounts allowed by the Registrar in respect of refresher fees and payments for a second appellant should not be included in the brief fee but should be separately assessed as is the practice in other courts (paragraph 28).
- (10) We do not recommend any change in the maximum or minimum fees prescribed in the Appeal Aid Certificate Rules apart from the conference fee mentioned in Conclusion (4) (paragraph 30).
- (11) Provision should be made, if necessary by legislation, to enable payment to be made to a solicitor or counsel assigned to give legal aid to an appellant or a defendant, for work undertaken in connection with an application for bail before a Judge in Chambers (paragraph 32).
- (12) The level of remuneration allowed to solicitors or counsel assigned to give legal aid under an appeal aid certificate appears, in general, to be adequate but it is desirable to achieve a greater degree of uniformity in the standards of assessment (paragraphs 34 and 35).
- (13) The same points of difficulty about taxation practice arise on appeal aid certificates as on defence certificates and the views we expressed in our first report on the practice of taxation and assessment are in general relevant to appeal aid certificates except that prosecution costs are not available as a yardstick for assessing the fees of counsel assigned under an appeal aid certificate (paragraphs 36-39).
- (14) We see no objection, in appeals to quarter sessions, to the submission of a fee note detailing the work done by counsel and, if counsel wishes, containing proposals of the fees which, it is considered, should be allowed (paragraph 40).
- (15) The existing provisions for legal aid for the purpose of obtaining advice on whether an applicant has grounds for appeal or of obtaining assistance in drawing up a notice of appeal or application for leave to appeal are unsatisfactory; this is a complex problem which clearly requires further consideration (paragraphs 43-53).

- (16) There are some cases in which it is not possible to give effective advice within the time allowed for lodging notice of appeal (paragraphs 50 and 51).
- (17) The law should be amended in order that payments made to a solicitor for work reasonably undertaken in giving notice of appeal may, where appropriate, include a fee to counsel for settling the grounds of appeal (paragraph 54).
- (18) Regulation 6 of the Poor Prisoners' Defence (Defence Certificate) Regulations should be amended to avoid doubt as to the power of the courts to authorise payment under the regulation, in appropriate cases, for a copy of the transcript (paragraph 54).
- (19) An amendment of the law is desirable to clarify the position with regard to the payment of witnesses' expenses in appeals to quarter sessions and in non-indictable cases in magistrates' courts (paragraphs 55-57).
- (20) It should be considered whether further statutory provision is needed to ensure the surrender by a person to whom legal aid has been granted, of costs received from the other party under an order of the court (paragraphs 58 and 59).
- (21) We reiterate the view expressed in paragraph 75 of our first report that there is need for a broadly based review of the whole machinery for providing legal aid in criminal proceedings (paragraph 62).

64. Mr. Priss and Miss White of the Home Office, and Mr. Flanders of The Law Society have continued to assist us as they did with our first report and we wish to record again our gratitude.

R. R. PITTAM, *Chairman*  
 H. BOGGIS-ROLFE  
 SPROULE BOLTON  
 C. L. BURGESS  
 W. O. CARTER  
 E. J. T. MATTHEWS  
 R. LANCASTER  
 P. M. VINE

M. L. PRISS, *Secretary*  
 8th March 1963.



# APPENDIX A

## Appeals to Quarter Sessions

### Fees allowed under the Appeal Aid Certificate Rules 1960

The information in this Appendix has been extracted from returns made by the courts listed in Appendix B. The figures relate to appeals which were concluded in one day or less and in which there was a single appellant. They do not include cases where the appeal was abandoned.

Appeal against	Brief fees allowed to counsel				Basic fees allowed to solicitor					
	No. of cases in which				No. of cases	No. of cases in which				Average fee allowed
	No. of cases	Mini- mum fee (£8 13s.) allowed	Between £8 13s. and 15 gns. allowed	15 gns. to 20 gns. allowed		Over 20 gns. allowed	Between 8 gns. and 15 gns. allowed	15 gns. to 20 gns. allowed	21 gns. to 30 gns. allowed	
Sentence ...	43	7	22	13	1	1	14	20	4	£ s. d. 34 15 0 15 19 10
Conviction ...	42	1	9	18	14	14	6	16	3	£ s. d. 42 0 0 21 19 8
Conviction and Sentence ...	17	—	7	8	2	2	3	9	6	£ s. d. 31 10 0 20 18 2
Total number of cases covered by the returns ...										
Cases which lasted more than one day ...										
Cases in which appeal was abandoned ...										
Cases in which there was more than one appellant ...										
Cases in which legal aid was granted to the respondent ...										
Cases in which a conference fee was allowed ...										
Cases in which a fee for an opinion was allowed ...										
Cases in which representations were made against the amount allowed (Rule 8) ...										
Cases in which the "escape clause" (Rule 6) was applied to increase fees beyond prescribed maxima ...										

## APPENDIX B

Fees allowed under the Appeal Aid Certificate Rules 1960

Courts of Quarter Sessions from which information was obtained

### NORTH EASTERN CIRCUIT

Yorkshire, West Riding  
Kingston upon Hull  
Newcastle upon Tyne  
Sunderland

### WALES AND CHESTER CIRCUIT

Glamorgan  
Chester  
Swansea

### WESTERN CIRCUIT

Hampshire  
Exeter  
Bridgwater

### NORTHERN CIRCUIT

Cumberland  
Liverpool Crown Court  
Wigan

### OXFORD CIRCUIT

Gloucestershire  
Oxford  
Stoke-on-Trent

### MIDLAND CIRCUIT

Derbyshire  
Lincolnshire (Parts of Lindsey)  
Birmingham  
Nottingham

### SOUTH EASTERN CIRCUIT

Cambridgeshire  
Kent  
Colchester  
Croydon  
Brighton

Middlesex





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# **Legal Aid In Criminal Proceedings**

**Final Report of the Working Party**



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Mr. M. L. Priss (Secretary)	...	Home Office



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